

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

SCHIPPERS EXCAVATING, INC. and  
NEDERVELD, INC.,

UNPUBLISHED  
June 23, 2011

Plaintiffs/Counter-Defendants-  
Appellees,

v

No. 295754  
Kent Circuit Court  
LC No. 08-004607

CRYSTAL CREEK ENTERPRISES, L.L.C.,

Defendant,

and

FIFTH THIRD BANK,

Defendant/Cross-Defendant-  
Appellant,

and

INTEGRITY TREE SERVICES OF MICHIGAN,  
INC.,

Defendant/Counter-Plaintiff/Cross-  
Plaintiff.

---

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Crystal Creek Enterprises, L.L.C. was the developer and general contractor for a subdivision development plan in Grand Rapids (“The Landings at Crystal Creek”). Fifth Third Bank provided almost \$3 million in financing for the project and disbursed funds on a monthly basis to Crystal Creek so the developer could meet its ongoing financial obligations. Unforeseen costs arose and the loan amount no longer sufficed to meet Crystal Creek’s needs. Schippers Excavating, Inc., a subcontractor on the project, threatened to cease its work unless Fifth Third made written assurances that it would be paid. Fifth Third presented a written “confirmation” that it would “provide the necessary financing for the updated costs” to be incurred by Schippers.

In the end, neither Crystal Creek nor Fifth Third paid Schippers in full, the development project ceased for lack of funding, and this lawsuit between Fifth Third, Crystal Creek and various subcontractors was born.

After securing financing and beginning work on the development project, Crystal Creek discovered that its original engineer had underestimated the level of work and cost involved. Crystal Creek hired Nederveld, Inc. to revise the project plan. Based on this revised plan, Schippers provided a new estimate of its costs to excavate the land. The total projected cost of the development began to exceed Crystal Creek's loan amount, a situation referred to by Fifth Third as an "out-of-balance loan" or "out-of-balance situation."

Schippers advised Crystal Creek that it would halt its excavation of the property unless it was assured that there were sufficient available funds in the loan to pay Schippers for its scheduled work. Crystal Creek provided Schippers this assurance and directed Schippers to the Fifth Third Loan Relationship Manager handling the development project, Thomas Bissett. Schippers orally communicated to Bissett that it required a written assurance *from Fifth Third* that Schippers "would get paid for the balance of this project" or it would cease work.

On November 2, 2007, Bissett faxed the following letter to Schippers:

In reference to the development known as The Landings at Crystal Creek, Fifth Third Bank ("Lender") and Crystal Creek Enterprises, L.L.C. ("Borrower") have a contractual agreement in which Fifth Third provides development financing for the project. Due to recent unforeseen events involving the prior project engineer, the projected development costs have been altered.

The Bank recognizes the cost budget for land development at The Landings at Crystal Creek has increased and *will provide the necessary financing for the updated costs provided via fax from Schippers Excavating on 10/24/07.*

Please accept this letter of *our confirmation*. [Emphasis added.]

Schippers resumed its work after receiving this fax. However, Fifth Third stopped funding the project only three months later when it became clear that Crystal Creek could not secure additional investors or otherwise cure the out-of-balance situation of the loan. As a result, Schippers received only two more payments from Crystal Creek.

Schippers and Nederveld filed suit seeking to foreclose on their construction liens against the development property and alleging breach of contract against Crystal Creek. Schippers also raised a breach of contract claim against Fifth Third, but later amended its complaint to pursue a claim of promissory estoppel instead. Schippers sought \$295,095 in damages for the cost of

work it completed in reliance on Fifth Third's promise to pay.<sup>1</sup> Predictably, Crystal Creek became insolvent and its principal declared bankruptcy.

Thus, the sole issue that remained viable for trial was Schippers's claim for promissory estoppel against Fifth Third. Schippers contended that Fifth Third promised, by its fax letter, "to provide funds to pay [Schippers] for certain labor and materials in connection with improvements made to the property." Schippers alleged that Fifth Third knew or should have known that Schippers would act in reliance on the promise and that Schippers actually continued its work based on this promise to pay.

Fifth Third attempted to eliminate this suit before trial through a motion for summary disposition under MCR 2.116(C)(7) and (10), but its motion was denied.<sup>2</sup> At trial, Fifth Third sought a directed verdict at the close of Schippers's case-in-chief, which was also denied. The crux of these motions was that the fax letter from Fifth Third to Schippers was not a clear and definite promise, but rather, merely served to acknowledge Fifth Third's financing agreement with Crystal Creek. Fifth Third further contended that, even if the letter contained a "promise," Schippers's purported reliance was unreasonable because Crystal Creek, not Fifth Third, was contractually bound to pay Schippers for its services. Schippers's countered that Fifth Third knowingly made a promise to pay in order to induce Schippers to continue working because Fifth Third wanted to protect its own financial investment in the project.

Ultimately, the jury returned a verdict in Schippers's favor and awarded the requested damages. The jury specifically found that Fifth Third made a "clear and definite promise" to Schippers and knew or should have reasonably expected that the promise would induce Schippers to continue working. The jury found that Schippers acted in reliance on the promise and suffered financial injury as a result. Not one to accept defeat, Fifth Third then filed a motion for judgment notwithstanding the verdict or a new trial, which the trial court also denied.<sup>3</sup> This appeal as of right followed.

## I. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

---

<sup>1</sup> Schippers and Nederveld also sought to foreclose against fellow subcontractor Integrity Tree Services and Integrity, in turn, filed a cross-complaint against Fifth Third and a counter-complaint against Schippers and Nederveld. The trial court dismissed all claims involving Integrity before trial and none of those claims are at issue in this appeal.

<sup>2</sup> The trial court rejected Fifth Third's motion for summary disposition under MCL 2.116(C)(7), which was based on the statute of frauds, given that the alleged promise from Fifth Third was, in fact, made in writing. Fifth Third does not challenge that decision on appeal.

<sup>3</sup> Fifth Third has not appealed the order denying its motion for judgment notwithstanding the verdict, only the orders denying its motions for summary disposition and directed verdict.

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Educ*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

We also review de novo a trial court’s decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the trial court’s ruling, this Court examines the evidence presented and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008).

In passing upon a motion for directed verdict, a trial judge must consider the evidence in plaintiff’s favor *unqualified* by any conflicting evidence. The trial judge is not prohibited from considering evidence presented by a defense witness per se; rather, the judge may not consider evidence from any witness to the extent that it conflicts with evidence in plaintiff’s favor. [*Locke v Pachtman*, 446 Mich 216, 226 n 8; 521 NW2d 786 (1994) (emphasis in original).]

These principles find their origin in *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 117 (1868), in which Justice Thomas Cooley explained:

[W]e must look at the case as it appears from the plaintiff’s own testimony, unqualified by any which was offered on the part of the defendants, and must concede to him any thing which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we can not say that the jury might not have given it full credence. It is for them, and not for the court to compare and weigh the evidence.

## II. PROMISSORY ESTOPPEL

Viewing the record at both the pretrial and trial levels, we agree with the trial court’s assessment that Schippers presented more than adequate proof to support its claim for promissory estoppel and to allow the jury to find in its favor.

A claim of promissory estoppel requires the plaintiff to prove:

(1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. [*Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).]

In relation to a promissory estoppel claim, a “promise” is defined as “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 2, p 8. To support a claim, the promise must be “clear and definite.” *State Bank*, 442 Mich at 85. “[A] statement that is indefinite, equivocal, or not specifically demonstrative of an intention respecting future conduct” does not constitute a promise, but may instead be a mere statement of belief or a “prediction of future events.” *Id.* at 85-86. The parties’ relationship and the circumstances surrounding their transaction are relevant in determining whether the manifestation rises to the level of a promise. *Id.* at 86. Further, the party’s reliance on the promise must be “reasonable.” *First Security v Aitken*, 226 Mich App 291, 317; 573 NW2d 307 (1997), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). A merely conditional promise cannot induce reasonable reliance, only an actual promise will do. *State Bank*, 442 Mich at 84; *Aitken*, 226 Mich App at 316.

Here, the trial court correctly determined that Schippers presented sufficient evidence that a “promise” existed both at the summary disposition and directed verdict stages of the proceedings. In its fax letter to Schippers, Fifth Third acknowledged the change in the project cost and stated that Fifth Third “will provide the necessary financing for the updated costs provided . . . from Schippers. . . .” Read in the light most favorable to Schippers, the nonmoving party, this statement clearly established a genuine issue of material fact to present at trial and was sufficient for the jury to conclude that a promise was made.

Ample evidence also supported the contention that Fifth Third’s promise was not conditioned on Crystal Creek curing its out-of-balance loan situation. Fifth Third’s letter, standing alone, acknowledges that the project costs had increased but does not indicate that Crystal Creek had overdrawn on the loan account or defaulted in any way. There is no record evidence that Schippers was even aware that the problematic financial arrangement between Fifth Third and Crystal Creek remained unresolved. As such, there was sufficient evidence to present to the jury and for the jury to conclude that Schippers reasonably relied on an actual, not conditional, promise from Fifth Third.

Schippers presented sufficient evidence at both the summary disposition and directed verdict phase to support its assertion that Fifth Third made its promise to pay *knowing* it would induce Schippers to continue its work on the development project. Fifth Third admittedly had made a significant financial investment in the project which could only be profitable if the project was completed. The jury could certainly find that Fifth Third made its promise to pay in order to induce Schippers’s performance and protect its own financial interests.

The evidence was also sufficient to overcome Fifth Third’s motions for summary disposition and directed verdict in relation to Schippers’s actual reliance on Fifth Third’s promise. After receiving Fifth Third’s letter, Schippers returned to work and expended considerable sums towards the completion of the project. In relation to the final element of a promissory estoppel claim, there was sufficient evidence of an injustice to be remedied where Fifth Third acted in its own self-interest and urged Schippers’s continued performance

Accordingly, we affirm the trial court's orders denying Fifth Third's motions for summary disposition and directed verdict. Viewing the evidence in the light most favorable to Schippers and resolving all credibility contests in Schippers's favor, we find that Schippers presented sufficient evidence to create a genuine issue of material fact related to each element of a promissory estoppel claim and subsequently presented sufficient evidence to support the jury's verdict in its favor.

Affirmed.

/s/ Michael J. Talbot  
/s/ Elizabeth L. Gleicher  
/s/ Michael J. Kelly